No. 01-590

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

JOHN R. D'ALESSIO and D'ALESSIO SECURITIES, INC.,

Petitioners,

—v.—

NEW YORK STOCK EXCHANGE, INC., RICHARD A. GRASSO, EDWARD A. KWALWASSER and ROBERT J. MCSWEENEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS NEW YORK STOCK EXCHANGE, INC., RICHARD A. GRASSO, EDWARD A. KWALWASSER AND ROBERT J. MCSWEENEY IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether, as the Court of Appeals for the Second Circuit found, the district court had jurisdiction over petitioners' action?

2. Whether the Second Circuit properly held that respondents are entitled to absolute immunity from suits for damages arising out of respondents' allegedly improper exercise of their quasi-governmental duties under the federal securities laws?

PARTIES TO THE PROCEEDING

Respondent the New York Stock Exchange, Inc. (the "NYSE") is a New York not-for-profit corporation. The NYSE has no parent corporations and does not have any issued stock.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents the New York Stock Exchange, Inc. (the "NYSE"), Richard A. Grasso, Edward A. Kwalwasser and Robert J. McSweeney (collectively, the "Respondents") respectfully submit this opposition to the petition for a writ of certiorari (the "Petition," cited herein as "Pet.") of John R. D'Alessio and D'Alessio Securities, Inc. (collectively, "Petitioners"), seeking review of a judgment of the United States Court of Appeals for the Second Circuit, which held that the district court had jurisdiction to adjudicate Petitioners' claims and affirmed the dismissal of those claims on the ground that the Respondents are absolutely immune from suits for damages arising out of Respondents' allegedly improper exercise of quasi-governmental duties delegated to the NYSE under the federal securities laws.

STATEMENT OF THE CASE

The Petition presents two straightforward questions, neither of which warrants review by this Court. The first question is whether, as the Court of Appeals for the Second Circuit found, the district court had jurisdiction over Petitioners' action. The Second Circuit properly concluded that the district court had jurisdiction to adjudicate Petitioners' claims because resolution of those claims (if Respondents were not entitled to absolute immunity) would require the construction and interpretation of Sections 11(a), 15 U.S.C. § 78k(a) (Appendix for Respondents ("Resp. App.") at 14a-17a), and 19(g), 15 U.S.C. § 78s(g) (Resp. App. at 18a), of the Securities Exchange Act of 1934 (the "Exchange Act"), thereby presenting a substantial federal question. Contrary to Petitioners' assertions, the Second Circuit's decision is completely consistent with this Court's decisions in *Merrell Dow*

Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986), and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). There is no conflict among the circuits on this issue. The only circuit court to have considered the jurisdictional issue on virtually identical facts reached the same conclusion as the Second Circuit. *See Sparta Surgical Corp. v. National Ass'n of Secs. Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998).

The second question is whether the Second Circuit properly held that Respondents are entitled to absolute immunity from suits for damages based upon the conduct Petitioners alleged in their complaint. The Second Circuit properly held that Respondents are entitled to absolute immunity because all of Petitioners' claims are based upon Respondents' allegedly improper performance of the quasi-governmental duties delegated to the NYSE by Congress under the Exchange Act. The Second Circuit's holding is completely consistent with applicable Supreme Court precedent, *see, e.g., Barr v. Matteo*, 360 U.S. 564 (1959), and all circuit courts to have considered the issue are in agreement. *Cf. Partnership Exch. Secs. Co. v. National Ass'n of Secs. Dealers, Inc.*, 169 F.3d 606 (9th Cir. 1999); *Sparta Surgical Corp.*, 159 F.3d 1209; *Austin Mun. Secs., Inc. v. National Ass'n of Secs. Dealers, Inc.*, 757 F.2d 676 (5th Cir. 1985).

Factual Background

The Parties. Respondent NYSE is a New York not-for-profit corporation, registered with the Securities and Exchange Commission ("SEC") as a national securities exchange pursuant to Section 6 of the Exchange Act, 15 U.S.C. § 78f (Resp. App. at 2a-14a), and is a self-regulatory organization ("SRO") within the meaning of the Exchange Act. 15 U.S.C. § 78c(a)(26) (Resp. App. at 1a). *See D'Alessio v. New York Stock Exch., Inc.*, 258

F.3d 93, 96 (2d Cir. 2001) (Appendix for Petitioners ("Pet. App.") at 3a-4a); *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49, 51 (2d Cir. 1996). Pursuant to Section 19(g)(1) of the Exchange Act, the NYSE must "comply with the provisions of [the Exchange Act], the rules and regulations thereunder, and its own rules, and . . . absent reasonable justification or excuse enforce compliance" with these provisions by its members and associated persons. 15 U.S.C. § 78s(g)(1) (Resp. App. at 18a). The SEC has broad and exclusive authority, pursuant to Section 19(h)(1), to take remedial action against both the NYSE and its officials for failure to comply with the obligations imposed by Section 19(g). 15 U.S.C. § 78s(h)(1) (Resp. App. at 19a); *D'Alessio*, 258 F.3d at 96 (Pet. App. at 4a).

Respondents Richard A. Grasso, Edward A. Kwalwasser and Robert J. McSweeney were, at all relevant times, senior officers of the NYSE. Pet. App. at 2a. Petitioner John R. D'Alessio ("D'Alessio") was a member of the NYSE and conducted business as an independent floor broker through his wholly owned corporation, petitioner D'Alessio Securities, Inc. ("DSI"), which was a member organization of the NYSE. *D'Alessio*, 258 F.3d at 95, 96 (Pet. App. at 2a, 5a).

Factual Allegations Underlying the Complaint. In late 1997, the United States Attorney's Office for the Southern District of New York ("USAO") contacted the NYSE in connection with an ongoing investigation into possible violations of Section 11(a) of the Exchange Act and SEC Rule 11a-1, 17 C.F.R. 240.11a-1 (Resp. App. at 22a-23a) by certain independent floor broker members of the NYSE, including Petitioners, and certain non-members. *D'Alessio*, 258 F.3d at 96-97 (Pet. App. at 4a-5a) (citing *In re New York Stock Exch., Inc.*, Exchange Act Release No. 34-41574, 1999 WL 430863, at *2 (June 29, 1999)). The NYSE assisted the USAO, and later the SEC, with their investigation and prosecution of

Petitioners and others. *In re New York Stock Exch., Inc.*, 1999 WL 430863, at *6.

Both D'Alessio and DSI were sued civilly by the SEC for violations of Section 11(a).[1] D'Alessio, along with seven other NYSE members, was indicted for criminal violations of the same statute. *D'Alessio*, 258 F.3d at 97 (Pet. App. at 6a). Subsequently, pursuant to its oversight authority under Section 19(h) of the Exchange Act, the SEC commenced an investigation into the NYSE's surveillance of independent floor brokers for violations of Section 11(a) and related rules. On June 29, 1999, the SEC simultaneously commenced and settled administrative proceedings against the NYSE for failing adequately to enforce compliance with Section 11(a), Rule 11a-1 and related NYSE Rules. *In re New York Stock Exch., Inc.*, 1999 WL 430863.

In December 1999, the criminal indictment against D'Alessio was dismissed pursuant to a deferred prosecution agreement. *D'Alessio*, 258 F.3d at 97 (Pet. App. at 6a).[2] While acknowledging that their trading activities violated Section 11(a), Petitioners sued Respondents, alleging that their illegal trading had been the "unwitting" result of (1) the NYSE's alleged failure to advise NYSE members that such conduct was illegal, despite an affirmative duty to do so; and (2) deliberate efforts by

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[1] On May 2, 2001, the SEC settled its action against Petitioners by consent judgment. *See Securities and Exch. Comm'n v. Oakford Corp.*, Litigation Release No. 16,184, 2001 WL 460737 (May 2, 2001). As part of the settlement, Petitioners were permanently enjoined from violating Section 11(a) and Rule 11a-1, among other provisions of the federal securities laws, and D'Alessio consented to pay $200,000 in disgorgement and prejudgment interest. *Id.* at *1.

[2] All of the other NYSE members indicted with D'Alessio ultimately pleaded guilty to criminal charges relating to violations of Section 11(a). *In re New York Stock Exch., Inc.*, 1999 WL 430863, at *4 & n.8.

the NYSE to encourage independent floor brokers to violate Section 11(a). *D'Alessio*, 258 F.3d at 97-98, 103 (Pet. App. at 6a-7a, 14a).

Procedural History

Petitioners commenced this action in the Supreme Court of the State of New York, New York County, on December 14, 1999. *D'Alessio*, 258 F.3d at 97 (Pet. App. at 6a). Their complaint purported to allege state law causes of action for injurious falsehood and concealment, fraudulent deceit and concealment, negligent misrepresentation and concealment, and breach of contract against Respondents. *Id.* at 98 (Pet. App. at 7a). Each of these claims was predicated upon allegations that Respondents had (1) engaged in a conspiracy to violate, and cause others to violate, Section 11(a); and (2) breached an alleged duty to advise NYSE members of the correct interpretation of Section 11(a). *Id.* at 97-98, 103 (Pet. App. at 6a-7a, 14a). On January 13, 2000, Respondents timely removed the action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1441 (Resp. App. at 21a-22a). *Id.* at 98 (Pet. App. at 7a-8a). Petitioners did not seek remand of the case or otherwise challenge the jurisdiction of the district court. *Id.* (Pet. App. at 8a). Respondents moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), and on September 29, 2000, the district court dismissed the complaint, finding that in " 'perform[ing] . . . regulatory functions that would, in other circumstances, be performed by a government agency,' namely the [SEC,]" the NYSE and its officials "should be accorded the same absolute immunity that would be afforded the [SEC] and its employees in parallel circumstances." *D'Alessio v. New York Stock Exch., Inc.*, 125 F. Supp. 2d 656, 658 (S.D.N.Y. 2000) (Pet. App.

at 27a) (quoting *Barbara v. New York Stock Exch., Inc.*, 99 F.3d 49, 59 (2d Cir. 1996)). On October 17, 2000, Petitioners appealed the district court's decision to the United States Court of Appeals for the Second Circuit.

Although Petitioners had never challenged the removal of the complaint in this action, on October 27, 2000, the district court addressed the issue of its jurisdiction over Petitioners' action in its Opinion and Order denying a motion to remand the related case of *Frayler v. New York Stock Exch., Inc.*, 118 F. Supp. 2d 448 (S.D.N.Y. 2000). Because the *Frayler* complaint was virtually identical to the complaint in this action,[3] the District Court *sua sponte* examined the basis of its jurisdiction in this case, even though Petitioners had never challenged removal, and concluded that removal of this case had been proper. *Id.* at 451 n.4.

Decision Below. On July 19, 2001, a unanimous panel of the United States Court of Appeals for the Second Circuit (Meskill, Kearse, and Squatrito, JJ.[4]) affirmed the judgment of the district court in its entirety.

First, applying this Court's precedents in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), the Second Circuit found that Petitioners' claims, though asserted as state law causes of action, posed a substantial federal question for two reasons. The court held that Petitioners' allegations that Respondents conspired to violate Section 11(a) and Rule 11a-1 required the court to construe the federal

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[3] *See Frayler*, 118 F. Supp. 2d at 450 ("The complaint was copied, nearly verbatim, from a civil complaint drafted by counsel for [Petitioners], which had previously been removed from the New York State courts . . . .").

[4] Hon. Dominic J. Squatrito, United States District Judge for the District of Connecticut, sitting by designation.

securities laws, and that Petitioners' claims would also require a court to evaluate the scope of the NYSE's regulatory duties "*created under federal law*, to enforce [NYSE] members' compliance with those laws." *D'Alessio*, 258 F.3d at 101 (Pet. App. at 14a) (emphasis in original).

The Second Circuit then addressed the issue of whether the Respondents were entitled to absolute immunity from damage claims based on the conduct alleged. The Second Circuit rejected Petitioners' argument that its prior decision in *Barbara* had limited the "application of the doctrine of absolute immunity to cases involving misconduct in connection with disciplinary proceedings . . . ." *D'Alessio*, 258 F.3d at 105 (Pet. App. at 21a). The court held that Respondents were entitled to absolute immunity in the instant case because they were performing "quasi-governmental functions pursuant to the broad authority delegated to [them] by the Exchange Act." *Id.* at 106 (Pet. App. at 23a). The court concluded that because Respondents were "stand[ing] in the shoes of the SEC in interpreting the securities laws for [NYSE] members and . . . monitoring compliance with those laws . . . they should be entitled to the same immunity enjoyed by the SEC when it is performing functions delegated to it under the SEC's broad oversight authority." *Id.* at 105 (Pet. App. at 21a) (citations omitted).

REASONS FOR DENYING THE PETITION

Petitioners have not even attempted to demonstrate a "compelling reason" for this Court to grant a writ of certiorari, *see* SUP. CT. R. 10, and no such reason exists. The Second Circuit's decision does not conflict with a decision of any other Court of Appeals, nor is it in conflict with a decision by a state court of last resort.

Furthermore, the Second Circuit's decision is in harmony with this Court's precedent on the two issues on which Petitioners seek review.

On the issue of whether the district court had jurisdiction over Petitioners' action, the Second Circuit's decision is fully consistent with this Court's precedent on the issue, specifically *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). Those decisions recognized, as the Second Circuit did here, the well-settled principle that federal question jurisdiction exists where a plaintiff's claims, though couched as state law causes of action, require the construction and interpretation of federal law and the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law.

On the issue of absolute immunity, the Second Circuit's holding that the NYSE and its officials are absolutely immune from suits arising out of the performance of federally mandated regulatory functions is fully consistent with Supreme Court precedent granting governmental officials absolute immunity from non-constitutional claims arising out of alleged conduct "within the outer perimeter" of their official authority. *E.g.*, *Barr v. Matteo*, 360 U.S. 564 (1959).

I. The Second Circuit Properly Held That the District Court Had Jurisdiction to Adjudicate This Case

Article III of the Constitution vests the power to adjudicate all cases "arising under [the] Constitution [and] the Laws of the United States" in the federal judiciary. U.S. CONST. art. III, § 2, cl. 1 (Resp. App. at 1a). Through 28 U.S.C. § 1331 (Resp. App. at 20a), Congress provided that "[t]he district courts shall have original jurisdiction

of all civil actions arising under the Constitution, laws, or treaties of the United States." In addition, the federal courts have exclusive jurisdiction, pursuant to Section 27 of the Exchange Act, over "violations of [the exchange Act] or the rules or regulations thereunder, and all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules or regulations thereunder." 15 U.S.C. § 78aa (Resp. App. at 20a).

A case is "deemed to 'arise under' federal law 'where the vindication of a right under state law necessarily turn[s] on some construction of federal law.' " *D'Alessio*, 258 F.3d at 99 (Pet. App. at 10a) (quoting *Franchise Tax Bd.*, 463 U.S. at 9) (internal citation omitted). In such cases, "[f]ederal jurisdiction . . . is predicated on 'the presence of a federal issue in a state-created cause of action.' " *Id.* (Pet. App. at 10a) (quoting *Merrell Dow*, 478 U.S. at 810). The Second Circuit correctly found that Petitioners' state-created causes of action posed "a substantial federal question." *Id.* (Pet. App. at 10a-11a) (citing *West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188, 192 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987)).

A. Petitioners' Allegations of Violations of Section 11(a) Provide a Basis for Federal Jurisdiction

Despite Petitioners' attempt to frame their claims in common law terms, the Second Circuit recognized that each of their four causes of action is predicated on the alleged existence of a conspiracy among Respondents to violate, and to encourage NYSE members to violate, Section 11(a) of the Exchange Act. *D'Alessio*, 258 F.3d at 102 (Pet. App. at 16a) ("[T]he complaint is replete with allegations that the NYSE conspired to violate [the federal securities laws] and concocted a phoney interpretation of these laws and applicable NYSE rules that

it knowingly communicated to D'Alessio and other floor brokers to their detriment." (internal quotations omitted)). " '[T]he central premise' of D'Alessio's complaint 'is that the [NYSE and its various senior officials] violated and purposely encouraged [D'Alessio] and others to violate § 11(a) . . . by promulgating erroneous and misleading interpretations of that statutory provision.' " *Id.* (Pet. App. at 16a) (quoting *Frayler v. New York Stock Exch., Inc.*, 118 F. Supp. 2d 448, 450 (S.D.N.Y. 2000)). Consequently, "the vindication of [Petitioners' alleged] right[s] under state law necessarily turn[s] on [a] construction of federal law," *Franchise Tax Bd.*, 463 U.S. at 9, namely, Section 11(a).

While Petitioners argue that the federal issue here is "incidental," rather than "substantial," because there is no dispute that their conduct violated Section 11(a), Pet. at 5, this argument misses the point. Petitioners' "common law" claims are predicated on alleged violations of Section 11(a) *by Respondents*. Any court adjudicating such claims would necessarily have to construe Section 11(a) in order to determine whether Respondents' actions had violated the statute. The Second Circuit was therefore correct in holding that "the federal issue is substantial" because "the NYSE's alleged violations of the federal securities laws . . . underlie D'Alessio's state claw claims . . . ." *D'Alessio*, 258 F.3d at 102 (Pet. App. at 16a).[5]

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[5] The Second Circuit correctly distinguished the instant case from its prior decision in *Barbara v. New York Stock Exch., Inc.*, 99 F.3d 49 (2d Cir. 1996), explaining that resolution of the claims asserted in *Barbara* did not require construction or interpretation of a federal statute, but instead "required the district court to determine whether disciplinary proceedings initiated by the NYSE were consistent with its own internal rules and its contractual obligations to its members." *D'Alessio*, 258 F.3d at 101 (Pet. App. at 13a).

Petitioners' reliance on *Merrell Dow*, 478 U.S. 804 (1986), is misplaced. Pet. at 5. In *Merrell Dow*, this Court concluded that a substantial federal question was not presented where the federal statute allegedly violated merely created a "rebuttable presumption" of negligence. *Merrell Dow*, 478 U.S. at 812. In sharp contrast, Respondents' alleged participation in a conspiracy to violate, and cause others to violate, substantive obligations imposed by the federal securities laws is an essential element of each of the four causes of action asserted by Petitioners. As the Second Circuit noted, Section 27 of the Exchange Act vests exclusive jurisdiction in the federal courts over claims alleging violations of the federal securities laws and actions "brought to enforce any liability or duty created by the [Exchange Act] or the rules and regulations thereunder," 15 U.S.C. §78aa (Resp. App. at 20a), in recognition of the strong federal interest in resolving such questions. *D'Alessio*, 258 F.3d at 104 (Pet. App. at 18a).

B. The Complaint Presents a Substantial Federal Question Under Section 19(g)

Petitioners inexplicably ignore the Second Circuit's holding that federal jurisdiction was also supported by the complaint's allegations that the NYSE failed to satisfy its alleged "duty to its members to abide by and enforce its rules, and to accurately advise its members with respect to the securities laws." *D'Alessio*, 258 F.3d at 103-104 (Pet. App. at 17a-19a). As the Second Circuit recognized, the "source of the duty imposed upon the NYSE" to enforce and monitor compliance by its members with the Exchange Act "is found in *federal* law; namely in [Section 19(g) of] the Exchange Act." *Id.* at 103 (Pet. App. at 18a) (emphasis in original). Although the Complaint does not explicitly identify Section 19(g) as the source of this duty, federal jurisdiction

cannot be avoided by such "artful pleading" because "the propriety of the NYSE's actions, as prescribed under federal law . . . is at the heart of D'Alessio's allegations." *Id.* (Pet. App. at 18a).[6]

The Second Circuit correctly held that Petitioners' claims would require adjudication of the scope of Respondents' duties under Section 19(g) and whether Respondents adequately fulfilled those duties. *D'Alessio*, 258 F.3d at 103 (Pet. App. at 18a). Petitioners' attempt to "enforce [a] liability or duty created by" Section 19(g) creates a substantial federal question, over which the federal courts have exclusive jurisdiction under both 28 U.S.C. § 1331 (Resp. App. at 20a) and Section 27 of the Exchange Act. 15 U.S.C. § 78aa (Resp. App. at 20a).

II. The Second Circuit Properly Held That Respondents Are Entitled to Absolute Immunity When Performing Regulatory Functions Under the Exchange Act

A. The Second Circuit's Decision Is Consistent With Applicable Supreme Court Precedent

The Second Circuit explicitly "rejecte[d Petitioners'] attempts to limit . . . [the] application of the doctrine of absolute immunity to cases involving misconduct in connection with disciplinary proceedings and excluding

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[6] While Petitioners also attempt to identify a non-statutory basis for an alleged duty to provide them with interpretive advice by alleging that the NYSE had a contractual obligation to provide such interpretive advice, *see* Pet. at 3-4, the Second Circuit correctly recognized that, "D'Alessio's breach of contract claim against the NYSE only is based on the membership agreement executed by D'Alessio and the NYSE that is required under the Exchange Act for D'Alessio to execute trades on the NYSE floor." *D'Alessio*, 258 F.3d at 102 n.6 (Pet. App. at 15a n.6). Consequently, resolution of Petitioners' purported "contract" claim would also require the courts to define the scope of the NYSE's regulatory duties under the Exchange Act.

activities of the NYSE, as a[n] SRO, in performing quasi-governmental functions pursuant to the broad authority delegated to it by the Exchange Act." *D'Alessio*, 258 F.3d at 105 (Pet. App. at 21a). Petitioners argue that the Second Circuit's decision in *D'Alessio* is inconsistent with Supreme Court precedent restricting the doctrine of absolute immunity to "the prosecutorial and adjudicatory functions" of governmental or quasi-governmental officials. Pet. at 5 (citing *Butz v. Economou*, 438 U.S. 478 (1978); *Burns v. Reed*, 500 U.S. 478 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)). However, these cases are inapposite, because each of them involved alleged violations of rights arising directly under the U.S. Constitution. *See, e.g., Butz*, 438 U.S. at 480 (holding that the restriction of absolute immunity to cases involving prosecutorial, adjudicatory, or legislative functions was appropriate in the special context of "vindicat[ing] *constitutional* guarantees." (emphasis added)).

Butz did not disturb this Court's prior holding in *Barr v. Matteo*, 360 U.S. 564, 575 (1959), that government officials are absolutely immune from non-constitutional claims if the challenged conduct falls within the "outer perimeter" of their official authority. *Butz*, 438 U.S. at 489. The Second Circuit was therefore correct in affirming the district court's holding that NYSE officials are "entitled to absolute immunity for any actions within the 'outer perimeter' of the performance of such [regulatory] functions." *D'Alessio*, 125 F. Supp. 2d at 658 (Pet. App. at 28a) (citing *Barr*, 360 U.S. at 575).

In affirming the district court's decision, the Second Circuit noted that other circuit courts have likewise held SROs and their officials absolutely immune from damage suits arising from the exercise of their Exchange Act duties, regardless of whether the conduct alleged involved disciplinary proceedings. For example, in

Sparta Surgical Corp. v. National Ass'n of Secs. Dealers, Inc., 159 F.3d 1209, 1213-15 (9th Cir. 1998), the Ninth Circuit held that the NASD was absolutely immune from suit for claims arising from the NASD's decision to temporarily delist and suspend trading of plaintiff's stock on the opening day of its public offering. No allegations involving the NASD's disciplinary functions were made. Citing *Barbara*, the court stated that SROs enjoy absolute immunity from suits for damages "when they are acting *under the aegis of the Exchange Act's delegated authority* . . . ." *Id.* at 1214 (emphasis added).

In *Partnership Exchange Secs. Co. v. National Ass'n of Secs. Dealers, Inc.*, 169 F.3d 606, 608 (9th Cir. 1999), the Ninth Circuit again held that the NASD was absolutely immune from a suit for money damages arising from: (1) the NASD's alleged failure to advise plaintiff that its activities violated a new interpretation of an NASD rule; and (2) the NASD's subsequent attempt to discipline plaintiff for violating this new interpretation. Although the SEC had already found the NASD's new interpretation to be incorrect, *see id.* at 607, the Ninth Circuit found the NASD to be absolutely immune from suit because "underlying all of [the plaintiff's] allegations contained in its complaint is the NASD's conduct *undertaken under the authority delegated to it by the Exchange Act.*" *Id.* at 608 (emphasis added). The Ninth Circuit did not limit the application of absolute immunity to only those allegations involving the disciplinary proceedings.

B. All of the Conduct Alleged in the Complaint Involves the NYSE's Regulatory Functions

While not disputing that Respondents' alleged failure to provide Petitioners with "interpretive advice" involved Respondents' exercise of regulatory duties delegated by

the Exchange Act, Petitioners argue that their "contract" claim, and their claim that Respondents gave false information to federal law enforcement officials, did not involve regulatory functions and therefore should not have been subject to the doctrine of absolute immunity. Pet. at 7-8. Both of these arguments were properly rejected by the Second Circuit.

With respect to the contract claim, the Second Circuit correctly held that the "alleged misconduct of the NYSE as detailed in the complaint," and not the "manner in which [Petitioner D'Alessio] casts his claims against the NYSE (*i.e.* tort or contract)," determines whether the NYSE is entitled to absolute immunity in this case. *D'Alessio*, 258 F.3d at 105-106 (Pet. App. at 22a). The alleged contract between Petitioners and the NYSE was "the membership agreement . . . *required under the Exchange Act* for D'Alessio to execute trades on the NYSE floor." *Id.* at 102 n.6 (Pet. App. at 15a n.6) (emphasis added). Thus, even assuming *arguendo* that the membership agreement obligated the NYSE to provide Petitioners interpretive advice about the federal securities laws, such an obligation would clearly involve the NYSE's exercise of its regulatory duties under the Exchange Act. The provision of interpretive advice to NYSE members concerning compliance with the federal securities laws, whether characterized as imposed by a contract or directly by statute, is unquestionably a quasi-governmental function.

The Second Circuit also correctly found that the NYSE was exercising its regulatory duties under the Exchange Act when it provided information to the USAO during the criminal investigation of Petitioners' violations of the securities laws. Petitioners argue that the Second Circuit made a "factual error" in characterizing the NYSE's provision of information to the USAO as part of its "referral" function because of Petitioners'

assertion that the NYSE was itself a target of the investigation when the statements were made. Pet. at 7. The Second Circuit could not have committed such error because this allegation appears nowhere in the complaint. Even if it were, the allegation would add nothing to Petitioners' argument that the NYSE's alleged misstatements to federal law enforcement officials should not be considered part of the NYSE's "referral" function because the NYSE had improper motives in making such statements. *See* Pet. at 2. Absolute immunity attaches to the NYSE's exercise of its regulatory duties regardless of alleged bad motives. *See, e.g., Butz*, 438 U.S. at 492-95 (discussing *Spalding v. Vilas*, 161 U.S. 483 (1896) and *Barr*); *Barr*, 360 U.S. at 569, 571-72, 575; *Barbara*, 99 F.3d at 59 (NYSE absolutely immune despite allegation that the NYSE enforced an order barring plaintiff from its trading floor even *after* its Board of Directors had stayed the order and reversed all charges against the plaintiff); *Sparta*, 159 F.3d at 1215 (NASD absolutely immune despite allegations of "bad faith" in suspension of trading); *Austin Mun. Secs., Inc. v. National Ass'n of Secs. Dealers, Inc.*, 757 F.2d 676, 687-93 (5th Cir. 1995) (NASD absolutely immune from suit for alleged conspiracy to force plaintiff out of business). The NYSE's statements in response to the USAO inquiry were unquestionably related to its "duty [to] identify[ ] potential violations of the federal securities laws and assist[ ] in any criminal or civil investigation arising from a member's noncompliance . . . ." *D'Alessio*, 258 F.3d at 103 (Pet. App. at 18a).

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition for a writ of certiorari.

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Respectfully submitted,

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